1992

# Richard F. McKean v. Michael W. McBride, Alpine LTD., and Fidelity National Title Insurance Co., Geodyne II, a Utah general partnership, Dan C. Simons, and Arden J. Bodell : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

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| RICHARD F. McKEAN,<br><br>Plaintiff/Appellee<br><br>vs.<br><br>MICHAEL W. McBRIDE, ALPINE LTD., and FIDELITY NATIONAL TITLE INSURANCE CO., GEODYNE II, a Utah general partnership, DAN C. SIMONS, and ARDEN J. BODELL,<br><br>Defendants/Appellants | Case No. 920705-CA<br><br>District Court No. C85-4003<br><br>(Priority No. 16) |

# REPLY BRIEF OF APPELLANTS

Appeal From the Third Judicial District Court for Salt Lake County,
the Honorable John A. Rokich, District Judge

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# REPLY BRIEF OF APPELLANTS

## RESPONSE TO McKEAN'S STATEMENT OF FACTS

Appellants/defendants ("defendants") respond to McKean's Statement of Facts in his brief as follows. The paragraphs numbers below correspond with the paragraphs of the same number in McKean's brief.

11. As argued below, the lower court's finding (Finding of Fact No. 29) that the Uniform Real Estate Contract[1] was nothing more than an "option" granted to Child to purchase the interests of Cook, Lamoreaux, and Hansen is a conclusion of law and not a finding of fact. That conclusion was inconsistent with the plain language of the Uniform Real Estate Contract and with the subsequent treatment of the Contract by the Bankruptcy Court.

[1] A copy of the Uniform Real Estate Contract (Exhibit D-9) was attached to defendants' opening brief as Addendum E.

The fact that Child filed bankruptcy before his first payment was due does not diminish the validity of the Contract.[2]

13. McKean asserts that the Bankruptcy Court "ordered the bankruptcy trustee to sell the Traverse Mountain property free and clear of all liens at auction to the highest bidder." (McKean Brief, at 8.) The sale occurred on February 28, 1985. Defendants do not dispute this factual assertion so long as it is clear that Child's bankruptcy trustee had possession of and sold the entire Traverse Mountain property, not merely Child's one-fifth interest in the property under the Real Estate Sales Agreement dated June 1, 1978 (the "Alpine Contract").

## SUMMARY OF ARGUMENT

1. The question whether the appeal is moot was never decided by the lower court and is presently pending as an issue in an undecided district court action. Even on the merits, the appeal is not moot, since the validity of Ralph R. Tate's attorneys' lien and his right to execute on the collateral pledged in lieu of a supersedeas bond depends on the outcome of this appeal. So also does the right of Delaware Funding & Guaranty to retain any payments made by defendants.

2. McKean has no direct claim in his own right. He did not raise that issue below and cannot do so for the first time on appeal. Even on the merits, McKean had no privity of contract with any of defendants. He paid the annual installment payment for 1979

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[2] As argued below, the Court's "finding" also ignores the unambiguous language contained in Child's Third Amended Plan of Reorganization (the "Plan") that the interests of New Empire Development, Cook, Hansen, and Lamoreaux were assigned to Child by an "unrecorded Real Estate Contract dated September, 1980." (Exhibit D-32, at 4.) Cook, Lamoreaux, and Hansen voted in favor of the Plan (Exhibit D-60; Tr. Vol. I, at 213-14; Vol. II, at 244-46), which was confirmed by the Bankruptcy Court. (Exhibit D-32.)

solely on behalf of the buyers. If he has any claim at all, it is only because he received a written assignment of such claims in the 1985 assignment from Child, Cook, Lamoreaux, and Hansen.

3. Cook, Lamoreaux, and Hansen sold their interests in the Alpine Contract to Myron Child, who thereafter claimed it as his own in his bankruptcy proceeding. His Third Amended Plan of Reorganization, confirmed by the Bankruptcy Court, provided that he had purchased the property from Cook, Lamoreaux, and Hansen and that they were secured creditors of Child's with liens on the property. Under the doctrine of equitable conversion, the Uniform Real Estate Contract was sufficient to pass title to Child, even though he did not make the payment required by the agreement.

4. The failure of the Third Amended Plan of Reorganization did not reinstate ownership of Traverse Mountain in Cook, Lamoreaux, and Hansen. Nor did it affect the forfeiture of claims that they had under paragraph 2.6 of the Alpine Contract. The Third Amended Plan of Reorganization specifically provided, in Article XVI that if the Plan failed Child would "automatically forfeit" any right that he would otherwise have to require a conveyance of property under paragraph 2.6.

5. The post-confirmation dismissal of Child's bankruptcy did not affect the validity of the Plan. Under bankruptcy law, the Plan continues to be viable. The sale of the property by Child's trustee and the forfeiture of claims under paragraph 2.6 of the Alpine Contract survived the dismissal.

6. McKean's claim for a return of the money paid in 1979 is governed by a four year statute of limitations. His claims against defendants were not tolled by the filing of

Child's bankruptcy. He did not file his complaint within four years and his claims are thus time-barred.

7. McKean's claims are subject to a set-off, since his assignors owed Alpine the total purchase price of the Traverse Mountain property at the time they assigned their claims to McKean.

## ARGUMENT

### I.

### THIS APPEAL IS NOT MOOT.

**A. This Court previously denied McKean's motion to dismiss this appeal on the ground that it is moot.**

McKean previously raised the issue that the appeal is moot in a motion to dismiss the appeal filed on or about January 14, 1993. This Court initially responded to that motion by ordering a remand to the district court for an evidentiary hearing on the issues raised in the motion. (Order of Court of Appeals dated February 16, 1993.) On remand, the district court issued an Order dated May 5, 1993, ordering that McKean and his counsel, Ralph R. Tate, should file a separate equitable action to determine the issues relating to the validity of Tate's attorneys' lien and to determine the validity of the satisfaction of judgment. (Order, at 6; R. 1804.)[3] McKean's counsel, Ralph R. Tate, thereafter commenced an action in the Third

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[3] Relying on Midvale Motors, Inc. v. Saunders, 21 Utah 2d 181, 442 P.2d 938, 941 (1968) ("the better rule, in the absence of special circumstances requiring a contrary holding to prevent injustice, is to require counsel to bring a separate action against his client to determine the amount of his fee and to foreclose his charging lien if any he has"), the lower court in the present case held that "the preferred procedure would be to have a separate equitable action filed where all issues may be raised and all entities who may have a responsibility for the payment of the attorney's fees of the filing of the satisfaction of judgment may be named as parties to the proceeding." (Order, dated May 5, 1993, at 6; R. 1804.)

District Court[4] in his own name to determine the validity of his attorneys' lien and the validity of the satisfaction of judgment. No trial has yet been held in that action.

After the entry of the trial court's Order of May 5, 1993 (R. 1799-1805), this Court entered an order denying McKean's motion to dismiss the appeal. (Order dated August 23, 1993.) Having denied the motion to dismiss, this Court need not revisit the issue of mootness. This is particularly the case since the issue of the validity of Tate's attorneys' lien and of the filing of the satisfaction of judgment are issues presently pending in the lower court in the separate equitable action commenced by Tate.

This Court lacks jurisdiction to consider a matter that has not been ruled on by the lower court. The jurisdiction of the Court of Appeals is defined by statute as "appellate" jurisdiction. Utah Code Ann. § 78-2a-3(2) (1992). It does not have jurisdiction over issues not previously raised in the district court. DeBry v. Salt Lake County Bd. of Appeals, 764 P.2d 627 (Utah Ct. App. 1988).[5] Since the lower court has yet to rule on the issues raised by Tate regarding the effect of the Agreement between Delaware Funding & Guaranty and defendants, this Court has no jurisdiction to determine whether the appeal in the present case is moot.

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[4] Tate's new action is entitled Ralph R. Tate, Jr. vs. Richard A. Christenson, Franklin Financial, Delaware Funding and Guaranty, TR Investments, Richard F. McKean, Merlyn Hanks, Geodyne II, a Utah partnership, Alpine Ltd., Dan C. Simons, Arden J. Bodel, Micheal W. McBride, and John Does 1-10, Civil No. 930902810.

[5] See 5 C.J.S. § 1453 at 576 (1958) (a court, "in the exercise of its appellate jurisdiction is limited to a review of the actual proceedings of the lower court, and can consider no original matter not connected with those proceedings and acted upon below").

**B. This appeal is not moot.**

McKean asserts that the appeal is moot because the judgment from which the appeal was taken has been satisfied pursuant to an agreement between Delaware Funding & Guaranty and defendants.[6] He asserts that, "[b]ecause the judgment is satisfied, this appeal is moot except for court determination of the extent to which plaintiff's attorneys' lien attaches to the property pledged in lieu of a supersedeas bond." (McKean Brief, at 20; emphasis added.) By his own admission, McKean acknowledges that the validity of his counsel's lien as against defendants' property is dependent on the outcome of this appeal. If the judgment is reversed, there is no attorneys' lien that could attach to the property pledged by defendants' in lieu of a supersedeas bond. On the other hand, if the judgment is affirmed, McKean's counsel will undoubtedly seek to execute against the property pledged in lieu of a supersedeas bond. Defendants are entitled to have this appeal heard and decided so that it can be determined whether McKean's lawyer has any right to seek to enforce his claimed lien against defendants' property.

Moreover, even under the Agreement and Assignment between Delaware Funding & Guaranty and defendants the appeal is not moot. Although Delaware Funding & Guaranty filed a Satisfaction of Judgment, the parties agreed that the appeal should be pursued. Under that agreement, defendants agreed to pay Delaware Funding a certain amount, subject to the outcome of the appeal. Paragraph 6 of the Agreement and Assignment provides:

> The parties do not intend that the appeal of the McKean Judgment, presently pending in the Utah Court of Appeals, should be dismissed or

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[6] That agreement was put before this Court as an attachment to the Affidavit of Merlyn Hanks, filed on or about January 27, 1993. A copy is appended to this Reply Brief for the Court's convenience.

> otherwise affected by the execution of this Agreement and Assignment or the carrying out of its terms including the filing of the satisfaction of the McKean Judgment. The parties agree that the appeal shall be prosecuted until a final disposition is reached. In the event that the McKean Judgment is reversed or overturned, Delaware shall, within thirty (30) days repay any and all consideration that it may have previously received from Alpine, Geodyne II, Simons, or Bodell pursuant to this Agreement and Assignment.

Thus, if the judgment is reversed, Delaware Funding shall be required to repay to defendants the consideration that they had paid under the agreement. The outcome of this appeal will have a very real effect on the obligations between Delaware Funding and defendants. It is not moot.

## II.

## McKEAN HAS NO DIRECT CLAIM AGAINST DEFENDANTS IN HIS OWN RIGHT.

### A. McKean cannot argue that he has a claim in his own right for the first time on appeal.

In his brief, McKean argues, for the first time, that he has a claim as of right on his own behalf in addition to whatever rights were assigned to him by New Empire Development, Cook, Lamoreaux, and Hansen (collectively the "New Empire Group"). (McKean Brief, at 20-21.) McKean did not sue in his own right, however, but alleged in his Complaint only that he had received an assignment of claims from the New Empire Group and that he entitled to judgment based on the breach of the Alpine Contract. (Complaint, ¶¶ 8-13.) He did not raise this claim at trial and cannot do so on appeal for the first time. Mascaro v. Davis, 741 P.2d 938 (Utah 1987); Shine Dev. v. Frontier Invs., 799 P.2d 221 (Utah App. 1990).

**B. McKean does not have a claim against defendants in his own right.**

Even if this Court considers the merits of this assertion, it must fail. The trial court made no finding that McKean had "an equitable interest in the property" in the amount of his payment to Alpine, as he asserts on appeal. (McKean Brief, at 20.) Neither did the trial court find that "McKean had an actual and equitable cause of action against Alpine Ltd. to require delivery of the land." (McKean Brief, at 20.) The trial court held that Alpine had breached the Alpine Contract (Conclusions of Law No. 2; R. 681) and that McKean had a claim against defendants by virtue of his having received an assignment from the New Empire Group. (Findings of Fact Nos. 21, 22; Conclusion of Law No. 6; R. 676, 682.) McKean was not a party to the Alpine Contract, on which he filed suit, neither did he have any contract with Alpine or McBride. Without a written contract, his claim is barred by the Statute of Frauds. Utah Code Ann. § 25-5-1 (1989). As noted above, McKean's Complaint alleges, not that he had a direct right, but only that he had an assignment of claims from the New Empire Group. McKean cites no legal authority for his claim to an "equitable interest" in the property.

When McKean paid the $330,000 to Alpine and McBride, he did so on behalf of the New Empire Group.[7] The money constituted the annual installment payment due under the Alpine Contract (Finding of Fact No. 13; R. 674), a contract to which McKean was not a

[7] At trial, McKean testified that he paid the $330,000 "on behalf of the Buyers" and that he had "no direct contact [should be "contract"] with McBride or with Alpine." (Tr. Vol. I., at 70.) He and the New Empire Group agreed that the payment needed to be made "in order to keep that contract [the Alpine Contract] alive, which was $33,000." (Tr. Vol. I, at 40.)

party. The only contract that McKean had was an Earnest Money Agreement and Offer to Purchase with the New Empire Group. (Exhibit 3-P; Finding of Fact No. 12.)[8]

In his brief, McKean asserts (for the first time) that when he was unable to recover the land he "was entitled to the return of his money." (McKean Brief, at 20.) He provides no authority or legal analysis whatsoever to support this contention. He does not explain why defendants are liable to him if they had no contract with him and if his payment of $330,000, tendered as the annual installment payment due under the Alpine Contract, was made "on behalf" of the New Empire Group, who were the buyers under that Contract. (Tr. Vol. I., at 70.)

McKean asserts that his personal entitlement to a return of the money from defendants "was based on the written agreements between Alpine and the New Empire Group and between McKean and the New Empire Group and also upon the party performance by McKean by his delivery of the $330,000 to Alpine's agent." (McKean Brief, at 20.) He fails, however, to identify any contractual provision in the "written agreements between Alpine and the New Empire Group" that obligated the New Empire Group to repay the money to McKean in the event that property was not released under paragraph 2.6 of the Alpine Contract. There is no such provision in the Alpine Contract. Even if the Alpine Contract provided that the Buyers under that agreement would be entitled to a repayment (which it does not), that provision would not give McKean a direct claim against defendants.

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[8] Even the Earnest Money Agreement contained no provision requiring the New Empire Group to repay to McKean his $330,000. Nor was there any other signed agreement under which the New Empire Group was obligated to repay McKean's money, as McKean acknowledged at trial. (Tr. Vol. I, at 75-76.).

McKean's claim that he has a direct claim for repayment of the $330,000 based on "the written agreements . . . between McKean and the New Empire Group" (McKean Brief, at 20) is similarly insupportable. As McKean acknowledged at trial, there is no provision in the Earnest Money Agreement requiring repayment of his $330,000 by the New Empire Group, let alone Alpine. (Tr. Vol. I, at 75-76.) In any event, defendants are not bound by the agreement between McKean and the New Empire Group.

If McKean has any claim at all against defendants it can only be as a result of the Assignment given to him by the New Empire Group on June 12, 1985. As shown below, that Assignment conveyed no right or claim to McKean that had not already been discharged or waived as a result of Myron Child's bankruptcy. Consequently, when the New Empire Group gave McKean the assignment there were no claims for them to assign.

## III.

## COOK, LAMOREAUX, HANSEN, AND NEW EMPIRE DEVELOPMENT SOLD THEIR INTEREST IN THE ALPINE CONTRACT TO MYRON CHILD IN 1980 AND THUS HAD NOTHING TO ASSIGN TO McKEAN IN 1985.

### A. Cook, Lamoreaux, Hansen, and New Empire did not object to Child's claim that he owned the Traverse Mountain property under the Uniform Real Estate Contract nor did they object to being treated as secured creditors in Child's bankruptcy.

McKean's assertion that Cook, Lamoreaux, Hansen, and New Empire did not convey to Child their interests in the Alpine Contract seems difficult to understand. (McKean Brief, at 21-23.) On the one hand, McKean seems satisfied that the Bankruptcy Trustee sold one hundred percent of the Traverse Mountain Property (see defendants' opening Brief, at 21-22), yet on the other he insists that "[i]n reality Child owned nothing more than his partnership interest in the contract." (McKean Brief, at 22.) According to McKean, the

Bankruptcy Court was able to sell all of the property because of its "strong arm powers," which McKean describes as "inherent." (McKean Brief, at 22, 23.)

McKean does not attempt to describe the statutory basis on which the Bankruptcy Court exercised that kind of power to sell property that was not owned by the bankruptcy debtor and over which it had no control and to distribute the proceeds to Child's creditors. There is no statutory basis for the Bankruptcy Court to exercise "strong arm powers" of that sort. The Bankruptcy Court has no "inherent power" to take control of and sell property interests owned by persons other than the bankruptcy debtor.[9] McKean cites absolutely no basis for this erroneous description of bankruptcy law. McKean's contention about the "inherent powers" of the bankruptcy court is a sheer invention, utterly unsupported by any statutory or case citation.

In point of fact, the Bankruptcy Court's power to sell all of the Traverse Mountain property is well-documented in Myron Child's bankruptcy proceeding and, in particular, in his Third Amended Plan of Reorganization. When Child filed his Chapter 11 petition, he identified the Traverse Property--all of it--as one of his assets[10] and he identified Cook,

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[9] Under 11 U.S.C. § 363(h), a bankruptcy trustee may sell the undivided interest of a co-owner in property if certain conditions are met, such as the impracticability of partition in kind. In such an event, however, the co-owner is paid his share of the sale proceeds. Child's trustee did not sell the Traverse Mountain property under this section. Child's Plan clearly treats Child as the owner of all of the property and Cook, Lamoreaux, and Hansen as secured creditors. The proceeds of the sale were not divided among them as it would have been had the trustee's sale been made under Section 363(h). Alpine bought the property at the sale having credit-bid part of the amount it was owed by Child. See Trustee's Report Regarding Auction Sale, Exhibit D-48 (showing that there were no proceeds from the sale except those paid for administrative expenses).

[10] A copy of Schedule B to Child's bankruptcy petition entitled "Statement of all Property of Debtor" was attached to defendants' opening Brief as Exhibit G. That schedule identified

(continued...)

Lamoreaux, and Hansen as secured creditors, each holding a security interest in the Traverse Mountain property.[11] From that point on, the Bankruptcy Court, Child, McKean,[12] Cook,[13] Lamoreaux,[14] and Hansen[15] all considered that Child was the owner of all of the Traverse Mountain property. There were no dissenters among that group and no objections

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[10](...continued)
the Traverse Mountain property ("Acreage, 4,400 acres located between Draper City and Alpine City in Salt Lake and Utah counties") with a market value of $36,000,000.00. The Schedule also attached a detailed legal description of the Traverse Mountain property, including the parcels that McKean had demanded be released, which are identified in Finding of Fact No. 16 (R. 675). Schedule B was admitted at the trial as Exhibit D-25. Child testified that he listed all of the Traverse Mountain property as his asset because he believed he had purchased it pursuant to the Uniform Real Estate Contract (Exhibit D-9) and the Assignment (Exhibit D-8). (Tr. Vol. I, at 336, 339.)

[11] According to Schedule A-2 filed by Child with his bankruptcy petition (a copy of which is appended to defendants' opening Brief as Exhibit F), entitled "Creditors holding security," he owed each of Cook, Lamoreaux, and Hansen the sum of $500,000.00 plus interest. Child described the security for the debts owed to them as "4,400 acres purchased under Uniform Real Estate Contract dated September 19, 1980" with a market value of $36,000,000.00. Schedule A-2 was admitted at trial as Exhibit D-23.

[12] McKean made no objection to Child's claim of ownership of Traverse Mountain. He testified, in fact, that would have expected to be paid had Child been successful in selling the property under his bankruptcy plan. (Tr. Vol. I, at 74.)

[13] Cook testified he knew that Child claimed to own all of Traverse Mountain when he filed bankruptcy. (Tr. Vol. I, at 158.)

[14] Lamoreaux testified that he knew that Child claimed to own all of Traverse Mountain in his bankruptcy proceeding and that he was treated as a secured creditor. (Tr. Vol. I, at 193-94.)

[15] Although Hansen did not testify at the trial because of medical reasons (Tr. Vol. I, at 82), he voted for Child's Third Amended Plan of Reorganization, which provides that Child owned the entire property and which further provided that Hansen was a secured creditor. (Exhibit D-60; Tr. Vol. II, at 244-46).)

were filed. Cook, Lamoreaux, and Hansen all voted in favor of the Plan,[16] under which they were treated as secured creditors.[17]

The fact that the Uniform Real Estate Contract and the Assignment had been escrowed did not affect their validity in the minds of Cook and Lamoreaux, each of whom believed that the contract was valid and that Child was obligated to pay them the money that he owned. Cook testified that Child owed him $500,000 under the Uniform Real Estate Contract regardless of whether it was recorded or not. (Tr. Vol. I, at 152.) Cook expected to be paid in the event that the property was sold out of Child's bankruptcy. (Tr. Vol. I, at 159.) Lamoreaux also recognized the validity of the Uniform Real Estate Contract and admitted that he could have sued Child under that contract, but "chose to follow the plan [in bankruptcy] he gave us." (Tr. Vol. I, at 192.) According to Lamoreaux, the escrow was created so that Child would not have the right to the property until the money was paid. (Tr. Vol. I, at 193.)[18]

Although Child was not entitled to receive title, he was nevertheless obligated to make the payments under the executory installment land contract. He fails to explain how the trial court's conclusion that the Uniform Real Estate Contract was nothing more than an unenforced "option" when both Cook and Lamoreaux believed it to constitute a valid and

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[16] (Exhibit D-60; Tr. Vol. I, at 213-14, Vol. II, at 244-46.)

[17] Under the Plan, Cook, Lamoreaux, and Hansen were Class 8 secured creditors, having a priority No. 2. (Exhibit D-32, at 39.)

[18] That is precisely what the Uniform Real Estate Contract provided. According to paragraph 19 of the Contract, Cook, Lamoreaux, Hansen, and New Empire, as the Sellers, would not be required to give Child a warranty deed conveying title to the property until after the payments had been received. (Exhibit D-9.)

binding obligation of Child's. Indeed, under the plain and unambiguous language of the Uniform Real Estate Contract the transaction constitutes a sale of real property and not merely the creation of an "option."[19]

The trial court's conclusion in the present case that Child's interest in the property "did not include the interests of other partners of New Empire" (Conclusion No. 5; R. 682) was simply unfounded and is erroneous as a matter of law.[20] The Uniform Real Estate Contract was entirely effective to convey the New Empire Group's interest under the Alpine Contract to Child and was so treated by the Bankruptcy Court, Child, and all of Child's creditors including Cook, Lamoreaux, and Hansen.

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[19] The Uniform Real Estate Contract describes the transaction as follows: "the Seller [identified as New Empire Development Corporation, Hansen, Cook, and Lamoreaux], for the consideration herein mentioned agrees to sell and convey to the buyer, and the buyer for the consideration herein mentioned agrees to purchase the following described real property . . . ." (Uniform Real Estate Contract ¶ 2.) On its fact, the Contract does not create an "option" in Child, but a binding sale of real property interests.

[20] At the trial, the lower court acknowledged that Child's trustee "sold all the property, all of it." The court noted further that Child got the Traverse Mountain property "pursuant to the Contract" and that the Bankruptcy Court "deemed he owned the property and sold it." (Tr. Vol. II, at 310-11.) The trial court acknowledged that "the bankruptcy court determined that he [Child] owned all of it [Traverse Mountain] and sold all of it and whoever bought it bought it--all of the interest." (Tr. Vol. II, at 301-02.) The court asked McKean's counsel "That's not an issue now, that they only sold a quarter of an interest, is it?" To which McKean's attorney replied, "No." (Tr. Vol II, at 302.) In its Memorandum Decision, rather than finding that the Uniform Real Estate Contract was an unexercised "option," the trial court found that it "had the appearance of validity" but was an "exercise in futility." Without explaining the legal basis for its ruling, the trial court held that defendants' "reliance upon the particular Uniform Real Estate Contract to defeat plaintiff's claim as an assignee is not well-founded." (Memorandum Decision, at 8; R. 586.) The conclusions of law were, in fact, not prepared by the trial court, but by counsel for McKean. The trial court signed them without attempting to reconcile them with the Memorandum Decision.

B. **Child's Plan of Reorganization, which Cook, Lamoreaux, and Hansen voted for, specifically provided that they had conveyed their interest in Traverse Mountain to Child.**

During his bankruptcy proceeding, Child exercised control and ownership over Traverse Mountain without objection from any of the New Empire Group. As stated in defendants' opening Brief, Child's Third Amended Plan of Reorganization explains in clear terms how it was that Child owned the Traverse Mountain property. (Defendants' Opening Brief, at 17-18.)[21] In his brief, McKean ignored the provision in Child's Plan that specifically provided that Child owned all of Traverse Mountain. The Bankruptcy Court's confirmation of the Plan had the effect of finding and ordering that Child owned all of the Traverse Mountain property under the Alpine Contract. In the Plan, the "Traverse Mountain Property Interest" was defined as:

> any and all right, title and interest of Debtor [Child] in and to all or any portion of the Traverse Mountain Property, including, without limitation, any such right, title and interest in and to all or any portion of such property as Debtor may have pursuant to the Alpine Contract.

(Exhibit D-32, at 8; emphasis added.)

The Plan defined the "Alpine Contract" as "a certain Real Estate Sales Agreement dated June 1, 1978, by and between Michael W. McBride as 'Seller' and Ronald S. Cook, Myron B. Child, Jr., Ray W. Lamoreaux, Wendell P. Hansen and New Empire Development Co. collectively as 'Buyers.'" (Exhibit D-32, at 4.) In order to make clear that Child owned all of the buyers' interest under the Alpine Contract, the Plan specifically recited that the Alpine Contract

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[21] The Bankruptcy Court specifically ordered that the trustee be appointed pursuant to Article XVI of the Plan. (Exhibit D-42.) From that point, the Trustee owned all of Child's interest in Traverse Mountain.

> was assigned by Ronald S. Cook, Ray W. Lamoreaux, Wendell P. Hansen and New Empire Development Co. to Myron B. Child. Jr. by an unrecorded Real Estate Contract dated September, 1980.

(Exhibit D-32, at 4, under definition of "Alpine Contract.")[22]

Except to argue that the Plan was ineffective, McKean utterly ignores the significance of this provision in his brief. He does not address these crucial provisions of the Plan, under which Child was the owner of all of the Traverse Mountain property. McKean fails to explain why, if the Uniform Real Estate Contract were nothing more than an unexercised "option," Cook, Lamoreaux, and Hansen each voted for the Plan.

In his brief, McKean claims that the "bankruptcy court never addressed the issue of what portion of the property belonged to Mr. Child vs. other interested parties." (McKean Brief at 23.) That statement reflect's McKean's total ignorance of the Plan, which specifically provided that Child owned all of the buyers' interest under the Alpine Contract, which had been assigned to him by Cook, Lamoreaux, Hansen, and New Empire.

**C. Cook, Lamoreaux, Hansen, and New Empire sold their interest in the Alpine Contract under the doctrine of equitable conversion.**

In his brief, McKean argues that the doctrine of equitable conversion does not apply "because there was never a transfer of property to Child." (McKean Brief, at 23.) The

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[22] Under the terms of Article V of the Plan, Child was granted "an exclusive right" to sell on behalf of his bankruptcy estate "the Traverse Mountain Property Interest free and clear of all liens and encumbrances." It was pursuant to that provision that Child attempted to sell the Traverse Mountain property during his bankruptcy. That effort having failed without an "Acceptable Sale," as that term was defined in Article I of the Plan, the Bankruptcy Court ordered the appointment of a trustee to liquidate the Estate under Article XVI of the Plan. The Trustee held the same title to the Traverse Mountain property as had Child. When she sold the property at the auction, she sold all of the buyers' interest under the Alpine Contract. New Empire, Cook, Lamoreaux, and Hansen were left with no interest in that contract. When they made their assignment to McKean in June, 1985, they had nothing left to assign.

authorities cited in defendants' opening Brief are "distinguishable," he claims, "because they are cases in which the buyer had the use of the land and possession of the contract documents." (McKean Brief, at 22.) McKean cites no case for this erroneous statement. One searches the authorities cited in defendants' opening Brief in vain for a rule requiring actual possession of real property and of the contract documents in order for the transfer of equitable title to occur. The rule of Butler v. Wilkinson, 740 P.2d 1244, 1254 (Utah 1987), applies regardless of whether the vendee has actual possession of the property. That rule was affirmed by the Supreme Court in Cannefax v. Clement, 818 P.2d 546, 547-49 (Utah 1991) (holding that a vendee's interest in property under a uniform real estate contract is an interest in real property under the doctrine of equitable estoppel).[23]

Moreover, there is no factual basis for McKean's assertion that Child did not have possession of the Traverse Mountain property. The trial court made no such finding. The only evidence presented at trial suggests that Child did have possession of the property after the Uniform Real Estate Contract was signed. According to paragraph 3 of the Uniform Real Estate Contract, "[p]ossession of said premises [the Traverse Mountain property] shall be delivered to buyer [Child] on the 20 day of September, 1980." In addition, Child attempted to sell the property while he was in bankruptcy, as authorized by his Plan of Reorganization.[24] He must have been in possession of the property in order to try to sell it.

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[23] In its discussion of equitable estoppel, the Supreme Court in Cannefax makes no mention of any requirement that the vendee have possession of the property.

[24] According to Article V of the Plan, Child was granted the "exclusive right to sell on behalf of the Estate pursuant to an Acceptable Sale [a defined term] the Traverse Mountain Property Interest [a defined term] free and clear of all liens and encumbrances of title for a period commencing on the Confirmation Date and expiring on July 25, 1984.) (Exhibit D-32, (continued...)

There is no evidence that he was not in possession. Thus, even if McKean's understanding of the doctrine of equitable conversion is correct, Child's possession of the land was sufficient to cause equitable title to pass to Child. (McKean Brief, at 22.)

## IV.

## THE FAILURE OF THE PLAN DID NOT RESTORE ANY RIGHTS TO SUE DEFENDANTS UNDER THE ALPINE CONTRACT.

In arguing that the Plan became null and void when Child was unable to sell the Traverse Mountain Property within the time specified, McKean quotes a provision from Article XVI of the Plan. (McKean Brief, at 28.) He only quotes half of the sentence, however, omitting the most crucial language of the provision. The omitted portion flatly contradicts his assertion that the failure of the Plan restored to Child his claims against defendants for failure to release property under paragraph 2.6 of the Alpine Contract. The full provision is quoted below. The portion omitted in McKean's brief is underscored:

> Notwithstanding the occurrence of the Effective Date, if for any reason whatsoever and regardless of fault, the Approved Sale has not occurred on or before July 25, 1984, the Plan and all acceptances of the Plan and assumptions pursuant to the Plan shall be void and of no force or effect <u>(except that the matters approved in Article IV, the Super Priority Loan(s) pursuant to Article III and the disposition of the Canterbury Property pursuant to Article VII(A) shall be unaffected, and Debtor shall automatically forfeit any right Debtor might otherwise have to require the conveyance to or for the benefit of Debtor of acreage pursuant to the partial release provision of paragraph 2.6 of the Alpine Contract)</u> . . . .

(Exhibit D-32, at 28; emphasis added.)

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[24](...continued)
at 13.) He made substantial efforts to sell the property pursuant to the Plan (Tr. Vol. II, at 343), and even attempted to sell the property before the Plan was confirmed (Tr. Vol. II, at 342-343; Exhibit D-27).

Under this provision, if the Plan fails, it is "of no force or effect" except that Child shall "automatically forfeit" any right that he might otherwise have to require the conveyance of acreage "pursuant to the partial release provision of paragraph 2.6 of the Alpine Contract," which is the exact paragraph under which McKean is suing. (Complaint, ¶ 11; R. 3.) Defendants quoted this language in their opening Brief (Defendants' Brief at 25), and yet McKean completely failed to address its significance in his brief. Instead, he deleted that language in his brief, inserting an ellipsis in its place. Under that provision, the failure of the Plan creates a complete bar to any right under the Alpine Contract to receive partial conveyances of property.

## V.

## THE POST-CONFIRMATION DISMISSAL OF CHILD'S BANKRUPTCY DID NOT AFFECT THE VALIDITY OF THE PLAN OF REORGANIZATION.

McKean asserts that the dismissal of Child's bankruptcy in February, 1988, somehow invalidates all of the provisions of the Plan. (McKean Brief, at 24.) This is not so. Section 349 of the Bankruptcy Code delineates the effect of a dismissal in detail, referring to specific transactions and sections of the Bankruptcy Code that are affected by a dismissal. Section 349 does not provide that a plan confirmed under Section 1129 is somehow undone, set aside, or invalidated. Bankruptcy courts have thus held that a subsequent dismissal does not affect a confirmed plan.

In his brief, McKean cites only general provisions that the "basic purpose" of Section 349 of the Bankruptcy Code is to "undo" the bankruptcy case "as far as practicable." He cites no authority, however, that the dismissal of a bankruptcy case would "undo" the provisions of a confirmed plan. McKean ignores the case of Matter of Depew, 115 B.R. 965

(Bankr. N.D. Ind. 1989), cited by defendants (Defendants' Brief, at 34-35), which held that the post-confirmation dismissal of the Chapter 11 case "does not affect the finality of the confirmation order or the discharge that goes with it. . . . Both are effective 'without regard to whether the debtor pays according to the plan or not.' . . ." Id. at 967 (citations omitted).[25]

The sections referred to in Section 349 do not include Section 1129 (which governs confirmation of plans), Section 1141 (which provides that a plan is binding on a debtor and his creditors), Section 1104 (governing the appointment of a trustee), Section 1106 (governing the duties of a trustee), Section 363(b) (governing sales of property by a trustee), or Section 521 (governing the debtor's duties when a trustee is serving in a case). All of these sections had an effect on Child's bankruptcy case and on the sale of the Traverse Mountain property.

Even if the dismissal somehow revested Child with claims against Alpine, it is undisputed that, at the time Child made the assignment to McKean in June of 1985, Child was still in bankruptcy and had a trustee appointed. The subsequent dismissal (which occurred after this case was commenced) did not somehow vest McKean with claim against Alpine.

The dismissal of Child's bankruptcy case did not affect the validity of the Plan. Under the bankruptcy rules cited in defendants' opening Brief, that Plan is res judicata as to

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[25] The Depew court concluded that the dismissal of the Chapter 11 case after confirmation did not affect the plan in any way. To construe an order of dismissal as vacating a confirmed plan "would severely undermine the effect that Congress gave to confirmation of a plan and the need to give finality to the act of confirmation." Id. at 972.

all claims that were or could have been made against Child in his bankruptcy proceeding.[26] McKean's assertion that "by no stretch of the imagination can one claim that McKean's claim against Alpine was competently, fully, or fairly litigated" (McKean Brief, at 30) ignores the fact that the Plan represented a compromise between Child and his creditors, including Cook, Lamoreaux, Hansen, McKean, and Alpine.[27] Whether they agreed with the Plan or not, it was confirmed by an Order of the Bankruptcy Court. Being confirmed, the Plan constituted a new contract between the parties. The Plan's provision that claims for breach of paragraph 2.6 of the Alpine Contract are forfeited is res judicata and survives both the failure of the Plan and the dismissal of the bankruptcy case.

## VI.

## McKEAN'S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS.

In arguing that the claims against defendants for breach of the Alpine Contract were tolled by Child's bankruptcy filing, McKean misunderstands the effect of 11 U.S.C. § 362. That section does not bar claims against any persons who are not in bankruptcy.

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[26] McKean's attempt to distinguish Southmark Properties v. Charles House Corporation, 742 F.2d 862 (5th Cir. 1984), cited in defendants' opening Brief, focuses on meaningless differences while ignoring the central holding of the case. Under Southmark, a party to a confirmed plan cannot "undo a judicial decree which they had a full opportunity to contest, and chose not to." 742 F.2d at 872. Under that rule, none of Child's creditors--including Cook, Lamoreaux, Hansen, New Empire, and McKean--can attack the provisions of the Plan or the sale of the property by Child's trustee. They cannot alter, at this late date, the provision of Article XVI that Child forfeited his right to receive a partial reconveyance of the property.

[27] According to the Disclosure Statement filed in Child's bankruptcy case, the Plan's treatment of the secured claims of Cook, Lamoreaux, and Hansen "including its discount and classification" represented a "compromise" between the parties that they considered "to be in their respective best interest." (Disclosure Statement, ¶ 3, at 24; Exhibit 62-D; Tr. Vol. I, at 248-49.)

Child's bankruptcy filing meant only that his creditors--including McKean--could not sue him. It did not bar any claims against Alpine by Cook, Lamoreaux, and Hansen. Nor did it bar any claims that McKean may have had personally.

The trial court's conclusion that claims against defendants were tolled because their "ability to convey land was stayed by the bankruptcy proceedings of Myron Child" is simply erroneous. (Conclusion No. 8; R. 683.) If McKean (or his assignors) could sue for a return of the money in 1985, they could have sued for a return of the money in 1979 when the money was paid and the land not received. McKean erroneously assumes that he had to wait until he could no longer sue for specific performance before he could sue for return of the 1979 payment. (McKean Brief, at 32.) There is no rule of law, and McKean cites none, that requires exhaustion of remedies for specific performance before a plaintiff can sue for legal damages. Myron Child's bankruptcy did not prevent McKean in any way from going to court and suing these defendants to get his money back.

The four year statute of limitations applies. Like the written contracts in Brown v. Cleverly, 93 Utah 54, 70 P.2d 881 (1937), and Duncan v. Gisborn, 17 Utah 209, 53 P. 1044 (1898), the Alpine Contract, on which McKean is suing, contains no provision requiring the return of money paid if no land is conveyed. Any claim to a return of the money is thus "the implied promise of defendants to return the purchase money." Brown v. Cleverly, 70 P.2d at 885. A claim for breach of that implied promise is governed by the four year statute of limitations. That period of limitation began to run on the day that the land should have been released. The trial court found that McKean claimed the land should have been released on June 25, 1979, and, moreover, that the buyers sent a Notice of Default to McBride and Alpine

on July 3, 1980. (Finding of Fact Nos. 16, 17; R. 675.) Using either date, the action was not filed within four years and is time-barred.

## VII.

## McKEAN'S CLAIMS ARE SUBJECT TO A SET-OFF.

Even if the buyers under the Alpine Contract had no obligation to make further payments after Alpine failed to make a partial release of land in 1979, when Child filed bankruptcy he claimed ownership of the entire Traverse Mountain property, not only the portion that should have been released. In the bankruptcy proceeding it was determined that Alpine had a lien on the property in the approximate amount of $4,437,683.93. (Child's Disclosure Statement, Exhibit D-62.)[28] In arguing that there was no right of set-off, McKean again ignores the effect of Child's bankruptcy. According to his confirmed Plan of Reorganization, Child was the owner of the property and owed Alpine an amount equal to the present value of the Alpine Contract with interest. (See Third Amended Plan of Reorganization, Articles I(c)(i) and VI(A)).[29]

When McKean was given the assignment of claims against Alpine, he took the assignment subject to a set-off for the unpaid balance due under the Alpine Contract. Child owned the entire property which was disposed of by the bankruptcy auction without payment to Alpine. Alpine credit-bid $2,000,000.00 at the sale, which was less than half the amount it

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[28] In his bankruptcy schedules, Child stated that he owed Alpine the total amount of $6,450,000.00. (Exhibit D-23, at 2.)

[29] According the Article VI(a), Alpine (a Class 4 Claimant) was to be paid first in priority over all other creditors.

was due.[30] The remaining balance was still owed to Alpine when McKean received his assignment. Under the legal authorities cited in defendants' opening Brief, defendants were entitled to set off the sums owed to them by McKean's assignors against any amount that may have been owed to the assignors.

## CONCLUSION

The judgment should be reversed. McKean has no claim in his own right and received none by the assignment from the New Empire Group. Cook, Lamoreaux, Hansen, and New Empire had no claims to assign, having previously sold their interest in the Alpine Contract to Myron Child. Child had no claims to assign while he was in bankruptcy. His Plan of Reorganization specifically provided that, even if the plan failed, Child would have no right to receive any releases of property under paragraph 2.6 of the Alpine Contract. That provision by itself is conclusive of this litigation. It is res judicata. The lower court erred in holding that the claims of the New Empire Group, including Child, survived the bankruptcy proceeding. McKean's claims were also time-barred, not having been brought within four years after he paid the money on behalf of New Empire.

DATED this 19 day of November, 1993.

VAN COTT, BAGLEY, CORNWALL & McCARTHY

By: _____

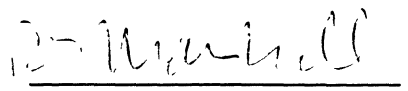
R. Stephen Marshall
Attorneys for defendants/appellants
50 South Main Street, Suite 1600
Salt Lake City, Utah 84145

[30] See the Trustee's Report Regarding Auction Sale, Exhibit D-48.

CERTIFICATE OF SERVICE

I hereby certify that I caused two true and correct copies of the within and foregoing Appellants' Brief to be mailed, postage prepaid, this 11 day of November, 1993, to the following:

Ralph R. Tate, Jr.
Attorneys for plaintiff
4685 Highland Drive, Suite 202
Salt Lake City, Utah 84117



## ADDENDUM

The Agreement and Assignment between defendants and Delaware Funding & Guaranty dated January 8, 1993, is appended to this Reply Brief.

**AGREEMENT AND ASSIGNMENT**

THIS AGREEMENT made and entered into this 9th day of January, 1995 between Delaware Funding & Guaranty, a Delaware corporation ("Delaware"), and Micheal W. McBride, Alpine Ltd., a Utah limited partnership, Geodyne II, a Utah general partnership, Dan C. Simons, and Arden J. Bodell ("Alpine").

RECITALS:

Whereas, Alpine is a limited partner in TR INVESTMENTS LTD., a Utah limited partnership ("TR") the sole asset of which is a parcel of real property in Salt Lake/Utah counties often referred to as Traverse Ridge ("Traverse"); and,

Whereas, FMA Thrift and Loan Company ("FMA") commenced an action in the First Judicial District Court for Box Elder County, State of Utah entitled FMA Thrift and Loan Company, now known as Moore Financial Company of Utah vs. Alpha Leasing Company, a Utah general partnership consisting of Dorius E. Black, Joseph Cannon, McKean Equipment Company, Inc., McKean Construction Company, Inc., Gritton and Associates, Richard J. McKean, Robert P. Apgood, and Rex J. Black, et al., Civil No 17754 (the "FMA Action"); and,

Whereas, FMA obtained a judgment in the FMA Action on July 19, 1984, in the principal amount of $855,553.25, together with interest, costs, and attorneys' fees (the "FMA Judgment"); and,

Whereas, West One Bank ("West One") became the successor in interest to FMA and thereby became the owner of all claims against defendants in the FMA Action and of the FMA Judgment; and,

Whereas, Richard J. McKean ("McKean") commenced an action against Alpine Ltd., Geodyne II, Dan C.Simons, and Arden J. Bodell in an action commenced in the Third Judicial District Court of Salt Lake County, State of Utah entitled Richard F. McKean vs. Micheal W. McBride, Alpine Ltd., and Fidelity National Title Insurance Company, Geodyne II, a Utah general partnership, Dan C. Simons, and Arden J. Bodell, civil# C85-4003 in (the "McKean Action"). McKean obtained a judgment in the McKean Action (the"McKean Judgment") against Alpine, Geodyne II, Simons, Bodell, and McBride; and,

Whereas, McKean s lawyer in the McKean Action, Ralph R. Tate, Jr., ("Tate") has claimed and filed an Amended Notice of Lien for attorney s fees pursuant to Utah Code Ann. 78-51-41, dated April 15, 1992, by which Tate claims a lien on the McKean Judgment in the sum of 35 percent of the McKean Judgment together with actual costs incurred. Tate alleges in his Amended Notice of Lien that costs are estimated to be $3,000 as of April 15, 1992; and,

Whereas, West One and Delaware entered into an agreement by which West One assigned to Delaware approximately $300,000 worth of the FMA Judgment, including the right to execute on assets of any of the Judgment debtors under the FMA Judgment; and,

Whereas, Pursuant to a writ of execution issued by the Court in the FMA Action, the Sheriff of Salt Lake County, State of Utah, conducted a public auction at which all of McKean's claims and judgments against Alpine, Geodyne II, Simons, and Bodell were sold. Delaware purchased such assets at the sale and is now the sole owner of the McKean Judgment; and,

Whereas, Alpine denies liability to McKean and has appealed from the McKean Judgment to the Utah Court of Appeals. The appeal is pending; and,

The parties hereto, then wish to settle all claims against each other and to satisfy the McKean Judgment.

AGREEMENT AND ASSIGNMENT:

NOW, THEREFORE, in consideration of the mutual covenants and obligations contained herein, and in further consideration of Alpine's assignment to Delaware of the first $10,000 received from the sale of any portion of Traverse, the parties do hereby agree as follows:

1. Alpine hereby assigns to Delaware the first $10,000 due Alpine from the sale of any portion of Traverse or from the sale of any portion of the Alpine's interest in TR. Furthermore, Alpine hereby instructs TR to pay directly to Delaware said funds on behalf of Alpine.

2. In consideration of the assignment by Alpine, as set forth above, Delaware for itself, its assigns, legal representatives, or anyone claiming by, through, or under it, hereby releases and forever discharges Alpine Ltd.,,Geodyne II, Dan C. Simons, Arden J. Bodell, and Micheal W. McBride, and their successors, assigns, insurers, and attorneys, and each of them, from any and all claims, indebtedness, causes of action, damages, costs, that in any way arise out of, are connected with, or relate to: (i) the McKean Action; (ii) the McKean Judgment; (iii) any and all

claims that have been, might have been, or may in the future be asserted by McKean or by Delaware in the McKean Action or in any future action or proceeding based upon the events, transaction or other factual matters alleged in the McKean Action including, without limitation, all claims for damages, contribution, indemnification, and other forms of relief, whether at law or in equity.

3. Delaware agrees to deliver to Alpine a satisfaction of the McKean Judgment for filing with the court in the McKean Action.

4. In the event that it is determined that Tate has a valid attorney's lien, Delaware shall pay to Tate a sum equal to 35 percent of the amount received by Delaware from TR at such time as Delaware shall receive any such amounts from TR. In the event that it is determined that Tate's alleged attorney's lien included costs incurred in the McKean Action, Delaware shall also pay Tate such costs as he is entitled to under the McKean Judgment. Delaware's obligation to pay Tate is contingent on a determination that he has a valid and enforceable lien on the McKean Judgment and limited to the funds actually received from TR.

5. Alpine's assignment of the first $10,000.00 of the proceeds from the sale of Traverse, as set forth above, is a compromise of disputed claim and is not to be construed as an admission of liability by Alpine.

6. The parties do not intend that the appeal of the McKean Judgment, presently pending in the Utah Court of Appeals, should be dismissed or otherwise affected by the execution of this Agreement and Assignment or the carrying out of its terms including the filing of the satisfaction of the McKean Judgment. The parties agree that the appeal shall be prosecuted until a final disposition is reached. In the event that the McKean Judgment is reversed or overturned, Delaware shall, within thirty (30) days repay any and all consideration that it may have previously received from Alpine, Geodyne II, Simons, or Bodell pursuant to this Agreement and Assignment.

7. Delaware warrants and represents that their has been no assignment of any of the claims being released hereby and that its execution of this Agreement and Assignment constitutes a full and complete release and discharge of those claims.

8. This Agreement and Assignment shall be binding on the parties' heirs, successors, and assigns.

9. This Agreement and Assignment shall be construed and enforced according to the laws of the State of Utah.

10. In the event of any claim, action, or lawsuit to enforce, modify, interpret, invalidate, rescind, or set aside any term or provision of this Agreement and Assignment, whether with or without suit, the prevailing party shall be entitled to an award of its costs and expenses, including a reasonable attorney's fee, incurred as a result of such claim, action, or lawsuit.

11. This Agreement and Assignment represents the entire agreement between the parties with respect to the subject matter hereof, and supersedes all prior agreements, contracts, or negotiations, which are of no further force or effect. This Agreement and Assignment may not be amended or modified except in writing executed by both of the parties hereto.

12. If any provisions of this Agreement and Assignment as applied to any party or to any circumstance shall be adjudged by a court of competent jurisdiction to be void or unenforceable for any reason, the same shall in no way affect (to the maximum extent permitted by applicable law) any other provision of this Agreement and Assignment, the application of any such provision under circumstances different from those adjudicated by the court, or the validity or enforceability of this Agreement and Assignment.

IN WITNESS WHEREOF, the parties hereto have caused their names to me signed hereunder.

Alpine Ltd., a Utah Limited Partnership,
by Geodyne II, a Utah General Partnership,

by _____, Partner
Micheal W. McBride

by _____, Partner
Dan C. Simons

by _____, Partner
Arden J. Bodell

_____
Micheal W. McBride

_____
Dan C. Simons

_____
Arden J. Bodell

Delaware Funding & Guaranty, a Delaware Corporation,

by _____, Secretary
Sally A. Taylor

**Acknowledgment**

TR Investments Ltd. hereby:

Acknowledges receipt of a copy of the above AGREEMENT AND ASSIGNMENT.

Confirms that Alpine Ltd. is a limited partner in TR.

States that TR acknowledges no claims superior to the above assignment.

Promised to abide as instructed in said AGREEMENT AND ASSIGNMENT.

IN WITNESS WHEREOF, the parties hereto have caused their name to me signed hereunder.

TR Investments Ltd., a Utah Limited Partnership,
by:

Franklin Financial, a Utah Corporation, General Partner

by _____, President

by Geodyne II, a Utah General Partnership,

by _____, Partner
Michael W. McBride

by _____, Partner
Dan C. Simons

by _____, Partner
Arden J. Bodell